

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 293 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BRANCH MANAGER VIJAY BANK

Versus

STATE OF GUJARAT

Appearance:

MR JA ADESHRA for Petitioner
PUBLIC PROSECUTOR for Respondent No. 1
SERVED BY DS for Respondent No. 2, 9
MR N.M.Kapadia for Respondent No. 3

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 21/03/97

ORAL JUDGEMENT

This Criminal Revision Application under section 397 of the Code of Criminal Procedure is directed against the order dated 27.6.1995 passed by the Sub-Divisional Magistrate, Ahmedabad city in case no.

2. Proceedings under section 133 of the Code of Criminal Procedure were instituted in the Court of the Sub-Divisional Magistrate, Ahmedabad on a complaint filed by Harshadbhai G Sejpai and six others. Their say is that they are residing in the colony known as Surya complex. The complex is divided into three blocks known as A, B and C. The opponent no.3 Gurukul Branch of Vijaya Bank is situated on the first floor of "C" block. There are six big windows in the front portion in which air conditioners are fitted. On the rear side there are two windows fitted with Air conditioners. They are directly opposite to the colony in which the applicants are residing. The distance between windows and their residences is only a few feet. The air conditioners operate during the period from 8.30 a.m. to 8.00 p.m. which causes great nuisance and physical discomfort and is injurious to health of the residents of the colony. It is further stated that the air conditioners emit gas and bad smell which cause great pollution in the whole colony.

3. The respondent bank filed reply denying the allegations. It is stated that the air conditioners do not emit gas or smell as suggested. It is further stated that the air conditioners fitted are brand new and they do not make any noise. It is also submitted that it is not a matter of public nuisance.

4. It appears that the learned Magistrate inspected the site on 23.2.1996. After inquiry the learned Magistrate held that there is an ingress/egress of the people in the colony and therefore, the premises is a public place. In view of this, the contention of the bank that it is not a public nuisance was rejected. Another contention of the bank that air conditioners do not make any noise and also do not discharge gas and for which certificates were also produced was rejected on the ground that the certificates were given by the companies for development of their business and to oblige the bank. Learned Magistrate also held that the construction of the building in which Bank is running was illegal as AUDA had only permitted construction for residential purpose. Considering the written arguments and the report of AUDA the learned Magistrate directed the bank to forthwith remove two air conditioners fitted near the place of residents and on the backside of the bank.

5. Learned advocate Mr. J.A. Adesara

appearing for the Vijaya Bank has assailed the order of the Sub Divisional Magistrate on various grounds. It is submitted that Yogi Engineers who are authorised dealers of Carrier air conditioners have issued a certificate stating that the air conditioners were installed after proper and scientific survey of the premises and keeping in mind of the fact that the branch is going for total automation and need for maintaining the temperature and humidity at the required uniform level as to create an environment conducive for computer operations. Any alteration/rearrangement may fail the optimum utility of the machines and thereby may cause to breakdown of the system. It is also certified that the model of machines supplied by them are the time tested and they do not create any excessive noise. It is also certified that the machines do not emit any harmful gas while in operation and that the compressors of the air conditioners are leakproof and that they are of international standard and are not health hazardous. The machines are periodically serviced by trained personnel and hence they are in good condition.

6. Learned advocate Mr. J.A. Adesara has also invited my attention to the certificate dated 15.2.1996 issued by Carrier Aircom Ltd. in which it is certified that out of three speeds of fanmotor maximum speed was made non-operatable to reduce the noise level as per instructions of Vijaya Bank. The compressor jacketing was done to reduce the noise level. It is also certified that the noise level is as per criteria provided and approved by Bureau of Indian Standards. Mr. Adesara has further contended that there is no finding of the learned Magistrate with respect to the noise. He submits that the entire order is vague and is based on no finding. He further submits that the learned Magistrate failed to consider that it is not a case of public nuisance. The learned Magistrate has exceeded the restricted jurisdiction under section 133 of the Code of Criminal Procedure. In support of his contention, learned counsel has cited various authorities, viz. 1988 Criminal Law Journal(NOC)55; 1975 Criminal Law Journal, 1717; AIR 1961 Bombay 263; 1973 Criminal Law Journal, 359; AIR 1943 Allahabad, 19; AIR 1955 Allahabad, 215; 1984 GLH, 1090 and 1995 Supplementary 4 SCC,54.

7. On the other hand, learned advocate Mr. Kapadia appearing for the non-applicant submits that public nuisance has not been defined under the Code of Criminal Procedure. However, in view of section 2(y) of the Code of Criminal Procedure, definition of nuisance as provided under section 268 of the Code can be read. He

therefore, submits that people in general who dwell and occupy the property in the vicinity and if any injury is caused to them, on account of any act or omission, that will also amount to public nuisance. He further submits that the petitioners are residing in the area which is just adjacent to the part of the building of the bank where air conditioners are fitted and therefore, nuisance caused by the said air pollution falls within the mischief of public nuisance.

8. I have considered the rival contentions.

It is not necessary to discuss all the authorities. The consensus is that the purpose of the provisions of section 133 is to enable the Executive Magistrate to pass quick orders and give speedy decisions in the cases where public nuisance or obstruction has been made in the right of public at large. The proceedings being of urgency, they are of summary in nature and as such do not need to obtain civil relief. This being a very exceptional jurisdiction, it should be rarely exercised with possible fairness and reasonable precaution. The first test which should be applied is that if the Magistrate does not take any action and direct the public to take recourse to the ordinary course of law, irreparable damage would be done and secondly, obstruction or nuisance should be an invasion on public right and not on individual.

9. Bearing in mind the aforesaid legal position and having read the impugned order of the learned Magistrate, in my view the order suffers from manifest illegality. At the first instance, looking to the scheme of section 133 of the Code of Criminal Procedure, District Magistrate, Sub-Divisional Magistrate or Executive Magistrate on receiving police report or other information on being satisfied of the conditions set out under section 133(1) of the Code may make a conditional order requiring the person causing such obstruction or nuisance within time fixed in the order to remove such obstruction or nuisance. Sub-section (1) of section 138 provides that if a person against whom an order under section 133 of the Code is made, appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case. If the Magistrate is satisfied that the order either as originally made or subject to such modification as he considers necessary is reasonable and proper, the order shall be made absolute without modification or as the case may be, with such modification. In the present case, it does not appear that the learned Magistrate passed the conditional order as required by sub-section (1) of section 133 of the Code of Criminal Procedure.

This is evident from the fact that there is no order making conditional order absolute. The impugned order only speaks that " the application of Harshadbhai and others is granted and therefore, the opponents are directed to forthwith remove two air conditioners." This cannot be said to be an order under section 138 of the Code of Criminal Procedure. On this ground alone, the impugned order deserves to be struck down.

However, dealing with the merits of the case, there is no finding of the Executive Magistrate with respect to the urgency of the matter. With respect of public nuisance, learned Magistrate has only stated that the bank can be said to be a public place as there is an ingress/outgress of the people in the colony. This finding is erroneous on its face as even according to the case of the applicant, a physical discomfort is caused to them because of closeness between their house and the two air conditioners. Even otherwise, there cannot be any discomfort to the person who is a passerby. Therefore, from all these facts, at the most it can be said that because of the operation of the air-conditioners, some inconvenience is caused to the applicants. This cannot be construed as a public nuisance. The third reason given by the learned Magistrate is that the bank has been constructed in the area which has been reserved for residential purpose. Learned Magistrate was obviously, in error and has in fact exceeded the jurisdiction in entering into the controversy whether construction was legal or not. This is beyond the scope of proceedings under section 133 of the Code of Criminal Procedure. If any physical discomfort is caused to the individual, the remedy is by way of a civil suit and all such questions may be gone into by the Civil Court, but in no case, the court of urgency under section 133 of the Code of Criminal Procedure has jurisdiction to entertain and adjudicate the question of physical discomfort of an individual person and illegal construction. Thus, on the merits of the case also, the impugned order passed by the learned Magistrate dated 27.6.1996 is not sustainable.

10. It is also argued by Mr. Adesara, learned counsel for the petitioner that the learned Magistrate inspected the site and therefore, he ought not to have decided the case. He relies on a decision of this Court in the case of Maneklal Karsandas vs. State of Gujarat, reported in 1991(1) GLR, 57. This Court, considering the provisions of sections 133, 138 and 139 of the Code of Criminal Procedure, held that the provisions do not authorise a Magistrate to have local inspection and an order based on such local inspection is

liable to be set aside. In this context, a reference may be made to section 310 of the Code of Criminal Procedure which permits a Judge or a Magistrate at any stage of inquiry or trial to make a local inspection. It may not take place of evidence of proof but it may be meant for appreciation of position on the point. In the case of Gobind Singh vs. Shanti Swaroop reported in 1979 (2) SCC, 267, an application under section 133 of the Code of Criminal Procedure was filed complaining that non-applicant was carrying on the occupation of a baker in the premises let out to him by the mill and had constructed an Oven and a chimney which constituted nuisance. The Apex Court relied upon the local inspection made by the learned Magistrate. The Apex Court said in para -6 that the Magistrate made a local inspection on the basis of which a report dated 11.2.1970 was prepared which shows that upper horizontal operation of chimney construction by the appellant juts out into the road to the extent of about 6 ft. The Apex Court gave finding on the basis of the inspection of the Learned Magistrate. It appears that the provisions of section 310 of the Code of Criminal Procedure and the judgment of the Apex Court in Govind Singh (Supra) case were not brought to the notice of the learned Judge. Thus, in view of the judgment of the Apex Court, in my view, the contention raised by Mr. Adesara is not sustainable and the same is accordingly rejected.

11. In view of the aforesaid discussion, this Criminal Revision Application is allowed and the order dated 27.6.1996 is quashed and set aside. Rule is made absolute.

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